

# This Time it's Serious

---

Maximilian Steinbeis

2018-12-08T11:38:36

Dear Friends of Verfassungsblog,

It is not easy to remain calm when in the three largest EU member states the ground is shaking under the feet of their respective governments as fiercely as it did last week. In Germany the shock is comparatively mild: the vote for Angela Merkel's successor at the top of the governing CDU party is generally perceived as a democracy-enlivening thing and a great experience, and at the end of the day the result of the process was a strong signal of continuity anyway – but precisely because of that, because the old white male conservative silverbacks once more find out that they will not have their way no matter how much they roar and thump their chests, because the lady they condescendingly like to call "mommy" ("Mutti") has taught them once again and in the very act of stepping down how to exercise and let go of power with sense and dignity, this whole show was truly awe-inspiring.

In France, on the other hand, street barricades are on fire. That sort of thing happens there with a certain regularity, but the violence with which the *Gilets Jaunes* rage over the president, his eco-tax and his Jupiter-likeness seems to be signaling: This time it's different. This time it's serious.

Whether that is so or not, I cannot judge. But a recent review article by Adam Gopnik in the *New Yorker* came to my mind, on Julian Jackson's new Charles de Gaulle biography, back in August, long before the high-vis protesters roamed the Champs Élysées. His assessment of De Gaulle as the father of the presidential constitution of the Fifth Republic, with reference to Jackson, is this: "By seeming to concentrate so much power on one regal figure, De Gaulle made it possible to rule France again, but also insured that opposition would have to be impassioned and clamorous to register at all. Prime Ministers, when they become unpopular, are eased out by their supporters; kings, when they become unpopular, must be thrown out by a mob. Afterward, theatrical mini-revolutions became the norm in French politics. The ability of each new President to survive the coming wave of street protests became even more important than his ability to hold the legislature together."

++++++A Note by the University of Aberdeen++++++

## **CfA: Political Concepts in the World**

*The University of Aberdeen, in collaboration with the Horizon 2020 Marie Skłodowska-Curie programme, is offering six Early Stage Researcher positions, lasting 3 years commencing September 2019, for ground-breaking research on how political concepts are used in the world.*

*ESRs will propose and develop their own research projects around the theme of how political concepts and their impact.*

Indicative topics and how to apply are detailed in the [Further Particulars](#)

+++++

Whatever the number of mistakes Macron politically and personally may or may not have made: Constitution matters. De Gaulle, who himself lost his power in the face of violent mass demonstrations in May 1968, had tailored a presidential system to his larger-than-life body that does not fit nor become any mortal. And if the youthful Not-Quite-Jupiter is now driven from his Elysian Fields and the *République Française* really turns out to be stuck between Le Pen's rock and Mélenchon's hard place – then the constitutional state of France is facing dark, dark times, and with it the whole of Europe.

## Held in Contempt

Prime Ministers, when they become unpopular, are eased out by their supporters? The *New Yorker* author probably had Great Britain in mind. Prime Minister Theresa May is certainly wildly unpopular right now along with her dismal Brexit negotiation results which will be voted on next Tuesday in the House of Commons. May's defeat seems almost inevitable. Her Majesty's Government, it seems, doesn't have a majority in Parliament any more.

This week May had already failed in parliament three times in one day, once in matter of a particular constitutional interest: the government had had Attorney General Geoffrey Cox draw up an expert opinion on the legal effects of the Brexit Agreement, which the Commons demanded to read in order to be able to form an informed opinion. The government refused to publish the paper, though, referring to the constitutional principle of attorney-client confidentiality. The Commons, however, put forward a competing constitutional principle, namely that the government must respect the will of the Parliament, and decided with a majority to hold the government in "contempt of parliament" for its obstruction. It's almost like we were in 1688. (Just as over in Paris, it's almost like we were in 1789 or 1830. Constitutional history has an uncanny way of giving shape to contemporary phenomena.)

The way Brexit is constantly changing Britain's unwritten constitution is a feast for constitutional scholars, that much is for sure. The balance between the constitutional institutions, between parliament and government has shifted over the last one and a half years and continues to shift. But what happens when May ultimately fails to get a majority for the Brexit Agreement in the House of Commons on Tuesday – whether she then resigns and calls for a general election, whether there is a vote of confidence which she might even *win* because the hard-core Brexiteers in her ranks would get what they wanted anyway without the risk of a snap election, whether even if she *doesn't* win she'll be able to hold on for some time as a caretaker government – all this seems possible at the moment, and it is no wonder that many in the UK speak of a constitutional crisis. We will try to get a blog post before the vote to untangle this knot a bit.

## Blue air and red lines

From the EU's point of view, the Opinion of the ECJ Advocate General in the *Wightman* case has made it likely that an "exit from the Brexit" for the **UK** would be viable under certain conditions under European law. [WALTHER MICHL](#) considers this to be good news in principle, while [ODEY HARAN](#) fears that European law would roll a Trojan horse into its own courtyard if the Court were to follow the recommendations of the Advocate General.

[JAN KEESEN, EMANUEL TOWFIGH and JACOB ULRICH](#) pour some cold water on the CDU chairperson election, as that "great moment of inner-party democracy" in **Germany** is to some extent tainted by the fact that there are no really valid reasons for presenting only the three celebrity candidates at regional conferences to the party base and not the also-rans.

**Hungary** has now managed not only to drive the CEU from Budapest into exile in Vienna, but also to go scot-free for the time being despite all the "red lines" drawn into the blue air by EPP faction leader and *Spitzenkandidat* Manfred Weber. [MILES MAFTEAN](#) underlines that perhaps it's not so much the CEU itself but rather the Hungarian students who are most to be commiserated with, as they are now deprived of any prospect of a higher education not corrupted by the Fidesz Party in their country.

**Ukraine** is celebrating the fifth anniversary of Euromaidan, while facing a possible war with Russia, which leads [ALINA CHERVIATSOVA](#) to take a critical stock.

**Poland** has announced that it will reverse the subjugation of the Supreme Court, but the bill has still not been signed by the President and has not entered into force. How serious is the PiS really with its alleged obedience to the European Court of Justice? [PIOTR BOGDANOWICZ and MACIEJ TABOROWSKI](#) warn the EU Commission and the Polish Supreme Court against prematurely withdrawing their applications to the ECJ.

**Switzerland** has decided by a clear majority against the so-called "self-determination initiative", which would have forced the country to violate international law in conflicts between constitutional law and human rights. [STEFAN SCHLEGEL](#) proposes to formulate a presumption for an interpretation of popular initiatives in favour of international law in order to make Switzerland's direct democracy capable of globalisation.

Following the election of right-wing extremist President Jair Bolsonaro, **Brazil** has reason to remember the military dictatorship of the 1970s and 1980s and the unfortunate role of the judiciary during that time, according to [EMILIO PELUSO NEDER MEYER and FABRÍCIO BERTINI PASQUOT POLIDO](#).

In **Germany** there is a draft for a "Fachkräfte-Einwanderungsgesetz" (Immigration Law for Skilled Workers), which [DAVID WERDERMANN](#) criticises for excluding people from safe countries of origin from the labour market in Germany.

The **German** electoral law has been in need of reform for many years, according to the Federal Constitutional Court. But the legislator just doesn't want to. Which is why the number of seats in the *Bundestag* will most likely completely gyrate out of control after the next election. [OLIVER LEMBCKE](#) and [FRANK HEBER](#) find the complacency of parliament in the face of this foreseeable scandal hard to accept.

## Constitutional Resilience

How resilient would the German legal and constitutional order be if one day an authoritarian party were to gain a majority? What are its particular strengths and weaknesses? What can Germany learn from the actual experiences of Poland and Hungary? In November, scientists and activists from Hungary and Poland discussed these questions with corresponding experts from Germany in Berlin for two days. The election of judges and constitutional judges, the role of the public prosecutor's office, media regulation and freedom of opinion, electoral, parliamentary and party law – the struggle for democracy is decided not least at the subconstitutional level, and in many cases there are rather sophisticated worst-practice models in place to be imitated by whoever finds them useful which have hardly been noticed or discussed so far outside Poland and Hungary. Why shouldn't those who oppose authoritarianism learn from each other as well?

The results of the conference will now be published on Verfassungsblog in an online symposium. After the introduction of the organizers [MATTIAS KUMM](#), [KRISZTA KOVÁCS](#), [GÁBOR ATTILA TÓTH](#) and [your's truly](#), [MATTIAS KUMM](#) and [CHRISTOPH GRABENWARTER](#) sharpen the contours of the concept of constitutional resilience, and [SUSAN ROSE-ACKERMAN](#) and [GÁBOR ATTILA TÓTH](#) clarify the relationship of rules and institutions to mere traditions and conventions. [MICHAELA HAILBRONNER](#) summarizes the discussions on the subject of the judiciary and public prosecution, [MATHIAS HONG](#) does the same with regard to media, freedom of expression and civil society, and [ANNA VON NOTZ](#) with regard to political competition: elections, party law, opposition rights. Finally, [JELENA VON ACHENBACH](#), [DIETER GRIMM](#) and [SUJIT CHOUDHRY](#) will present their respective lessons-learned conclusions.

This meeting was just the beginning. On each of these topics one could conference for days on end to get a clearer picture of how our legal and constitutional order would hold out under Hungarian or Polish conditions. We will stick to that. Expect more on this issue on these pages.

## Elsewhere

[ANDREAS ORATOR](#) reports on the hearing before the **German** Federal Constitutional Court regarding the EU banking union.

[CONSTANTIN COJOCARIU](#) investigates a judgment of the Strasbourg Human Rights Court in a **French** case concerning the right of people with disabilities to marry.

[DIMITER TOSHKOV](#) shows that there is a connection between the electoral success of the far-right Vox party in **Andalusia** and the issue of immigration.

"Agenda Pública", on the occasion of the 40th anniversary of the **Spanish** constitution, has published a whole series of reform proposals: by [MARIA JOSEFA RIDAURA](#) on internal security and fundamental rights, by [ANA MARÍA CARMONA CONTRERAS](#) on territoriality, by [ENRIQUETA EXPOSITO](#) on the monarchy, by [ANA MARÍA OVEJERO PUENTE](#) on the judiciary, by [MARIAN AHUMADA](#) on the Constitutional Court, by [ROBERTO FERNÁNDEZ LLERA](#) on the financial constitution, by [MAYTE SALVADOR CRESPO](#) on the reformability of the Constitution, by [RAFAEL BUSTOS GILBERT](#) on Europe and globalisation, by [IGNACIO GARCÍA VITORIA](#) on the economic constitution and by [MIGUEL ÁNGEL PRESNO DE LINERA](#) on Parliament.

[STEVE PEERS](#) has looked into the abyss the 5 million EU citizens in the **UK** will face in the case of a Hard Brexit. [MEG RUSSEL](#) and [ALAN RENWICK](#) are considering the possibility of a second referendum. [ILYA SOMIN](#) finds no democratic fault with the demand for a second referendum: "Those who live by the referendum sword risk dying by it."

[PIERRE DE VOS](#) does not agree with the interpretation of the **South African** Supreme Court of Appeal of the term "hate speech".

[MATHIAS CHAUCHAT](#) analyses the consequences of the independence referendum in **New Caledonia**.

So much for this week. All the best,

Max Steinbeis

